FABER HOTEL HOLDINGS SDN BHD A

v.

MENTERI SUMBER MANUSIA MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
MOHAMAD ARIFF YUSOF JC
[JUDICIAL REVIEW NO: R3(1)-25-133-2004]
16 FEBRUARY 2009

ADMINISTRATIVE LAW: *Judicial review - Remedies - Certiorari and* C
prohibition - Inordinate delay on part of Minister in referring matter of second respondent's dismissal to Industrial Court - Whether Minister's decision ought to be quashed - Right to livelihood - Balance of prejudice

LABOUR LAW: *Industrial Court - Reference by Minister - Inordinate* D
delay on part of Minister in referring matter of second respondent's dismissal to Industrial Court - Whether Minister's decision ought to be quashed - Right to livelihood - Balance of prejudice

LABOUR LAW: *Employment - Dismissal - Reference - Inordinate delay* E
on part of Minister in referring matter of second respondent's dismissal to Industrial Court - Whether Minister's decision ought to be quashed - Right to livelihood - Balance of prejudice

This was the applicant's application under O. 53 Rules of the High Court 1980 for the following orders: (i) an order of *certiorari* to F
quash the decision of the Minister for Human Resources ('Minister'), the first respondent, under s. 20 Industrial Relations Act 1967 ('IRA') referring the second respondent's representation to the Industrial Court for adjudication; and (ii) an order of prohibition preventing the Industrial Court from hearing the second G
respondent's representation under s. 20 IRA. The second respondent had been employed by the applicant as General Manager but was subsequently dismissed on charges of misconduct on 10 July 1998. He lodged a complaint with the Industrial Relations Department under s. 20 IRA on 1 September 1998, and conciliatory meetings H
were held, with the last meeting apparently held on 15 December 1998. Thereafter, the matter was in abeyance until 4 June 2004 when the applicant received a letter informing the parties that the Minister had decided to refer the matter to the Industrial Court. There was, hence, a delay of five years from the last conciliatory I
meeting and almost six years from the date of the second respondent's representation. Thus, the only issue in this application

concerned the inordinate delay on the part of the Minister in referring the matter of the dismissal to the Industrial Court under s. 20(3) IRA.

Held (dismissing the application with no order as to costs):

(1) If the Minister's decision to refer a dismissed employee's representation to the Industrial Court is quashed by reason of delay, the dismissed employee's interest will be directly affected. Further, the right to employment (the right to livelihood) has been recognised by Malaysian courts as a fundamental right under the Federal Constitution. On the facts of the present application, the applicant was concerned it could not procure the necessary witnesses, given the passing of time. No other reason was proffered. Bearing in mind the character of the applicant as a company whose activity was the management of hotels and *per se* that it would be properly organised with proper documentary records, even assuming that the witnesses might not be successfully found and called to testify (a proposition still to be tested), the documentary record should still be available, despite the delay. This court was not persuaded, given the circumstances and reasons given by the applicant for the alleged prejudice which would be caused if the Industrial Court were to be allowed to proceed to hear the referral, that the Minister's decision should be quashed. Balancing the alleged prejudice to the applicant against the prejudice that would be caused to the second respondent were this application to be allowed, this court decided in favour of dismissing the application. *Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* (refd); *R Rama Chandran v. Industrial Court of Malaysia & Anor* (refd); *Kumpulan Guthrie Sdn Bhd v. The Minister of Labour and Manpower & Ors* (refd). (paras 23 & 24)

Case(s) referred to:

Hong Leong Equipment v. Liew Fook Chuan [1996] 1 MLJ 481 ***(refd)***

Kumpulan Guthrie Sdn Bhd v. The Minister of Labour & Manpower & Ors [1986] 1 CLJ 566; [1986] CLJ (Rep) 426 HC ***(refd)***

Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Pemungut Hasil Tanah, Kuantan v. Oriental Rubber & Palm Oil Sdn Bhd [1985] 1 LNS 127 FC ***(refd)***

Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Kam Gin Paik & Ors [1986] 1 CLJ 283; [1986] CLJ (Rep) 33 PC ***(refd)***

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee [1983] 1 LNS 14 HC ***(refd)***

Pow Hing & Anor v. Registrar of Titles, Malacca [1980] 1 LNS 120 FC ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia [1997] 1 CLJ 147 FC ***(refd)***
Tan Boon Bak & Sons Ltd v. Government Of The State Of Perak & Anor [1982] CLJ 499; [1982] CLJ (Rep) 788 HC ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Legislation referred to:
Federal Constitution, art. 5
Industrial Relations Act 1967, s. 20(2), (3)
Interpretation Acts 1948 and 1967, s. 108
Rules of the High Court 1980, O. 53

Other source(s) referred to:
MP Jain, *Administrative Law of Singapore and Singapore* (1997), pp 501-508

For the appellant - Suganthi Singam; M/s Shearn Delamore & Co
For the 1st respondent - Sharifah Hascindie Syed Omar SFC
For the 2nd respondent - Jacinta Johnson; M/s Zul Rafique & Partners

Reported by Suresh Nathan

JUDGMENT

Mohamad Ariff Yusof JC:

Introduction

Procedural Background

[1] The application in this case was under O. 53 of the Rules of the High Court for the following orders:

(a) An order of *certiorari* to quash the decision of the Minister for Human Resources (Menteri Sumber Manusia), the first respondent, under s. 20 of the Industrial Relations Act, made on 27 May 2004, and notified on 4 June 2004, in referring the second respondent's representation to the Industrial Court for adjudication; and

(b) An order of prohibition to prevent the Industrial Court from hearing the representation of the second respondent under s. 20 of the Industrial Relations Act 1967.

[2] On the facts of this case, the second respondent was employed by the applicant as General Manager. He was dismissed from his employment on charges of misconduct on 10 July 1998. The second representation lodged a complaint with the Industrial Relations Department under s. 20 of the Act on 1 September 1998, and conciliatory meetings were held. The last meeting appeared to be held on 15 December 1998. Thereafter, the matter was in abeyance until 4 June 2004 when the applicant received a letter informing the parties that the Minister (the first respondent) had decided to refer the matter to the Industrial Court. On the facts, therefore, there was a delay of five years from the last conciliatory meeting, and almost six years from the date of the second respondent's representation.

[3] This judicial review application was thus founded on inordinate delay on the part of the Minister to refer the matter to the Industrial Court under s. 20 of the Act.

This Court's Decision

Upon considering the background facts, and the argument on inordinate delay, as against applicable law, I did not find this was a suitable case for the first respondent's decision to be quashed. I therefore dismissed this application for judicial review, but made no order as to costs since the inordinate delay was not occasioned by any conduct of the applicant.

The Issues

[4] The main and only issue in this application concerned the question of delay on the part of the Minister in coming to his decision to refer the matter of the dismissal to the Industrial Court under s. 20(3) of the Industrial Relations Act.

The Applicant's Case

[5] The issues were presented by counsel for the applicant in the following terms in his written submission:

> 13. Almost all of the Applicant's witnesses during the inquiry proceedings are no longer employed with the Applicant, save for the administration support clerk and the current whereabouts of these witnesses are not known. Another one of the Applicant's witnesses, Encik Hj M.Zain Ibrahim, the then General Manager

Human Resources & Admin of the Applicant who had issued several of the letters to the 2nd Respondent is also no longer in the employment with the Applicant as he retired on 13.11.2001 ...

15. As a result of this inordinate delay, the Applicant is now severely prejudiced in presenting its case before the 3rd Respondent ...

[6] It was the applicant's case that the Minister and the Director General of Industrial Relations were required in law to act expeditiously under s. 20 of the Act. Although no time limit was imposed by the Act on the Minister to come to a decision, he is nonetheless duty bound under s. 108 of the Interpretation Acts 1948 and 1967 to act promptly and expeditiously.

[7] The applicant relied on *Kumpulan Guthrie Sdn Bhd v. The Minister of Labour & Manpower & Ors* [1986] 1 CLJ 566; [1986] CLJ (Rep) 426 and *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* [1983] 1 LNS 14, in support of his position. Section 108 of the Interpretation Acts 1948 and 1967 which was cited in support provides the proposition that where no time is prescribed for anything to be done, "such thing shall be done with all convenient speed." Under the current s. 20, no time is prescribed within which the decision-makers are to act, and hence the argument was such action must be taken "with all convenient speed."

The First Respondent's Case

[8] Learned Senior Federal Counsel agreed the only real issue on the facts of this application concerned inordinate delay, but disputed there was any element of prejudice caused to the applicant. In fact, the burden is thrown back to the applicant, because the applicant itself did not saw it fit to follow up with the IRD after the conciliation proceedings. In this respect, the argument of waiver/condonation was raised; SFC argued "... clearly indicates that the applicant's condition is never prejudiced so as to warrant some form of reminder to the first respondent to act expeditiously."

[9] SFC addressed the issue as one of the proper exercise of discretion, as explained, for instance, in *Hong Leong Equipment v. Liew Fook Chuan* [1996] 1 MLJ 481. It is "the solemn duty" of the court to undertake a "meticulous examination" of the facts available before the Minister. If the examination reveals the representations

made are neither perverse, frivolous or vexatious, a decision not to refer is liable to be quashed by *certiorari*. Otherwise, the court should not interfere.

The Case For The Employee/Second Respondent

[10] The second respondent took a broadly similar position on the law. *Hong Leong Equipment (supra)* was again referred to, for the proposition that the Minister's role was "limited to ascertaining whether, on the facts and materials placed before him, the representation raise serious questions of fact or of law calling for adjudication."

[11] Counsel forcefully argued in his written submission:

> "... it would be ideal for the First Respondent and/or the Director General to act expeditiously when entertaining a reference under Section 20 of the Act", but "that does not mean that the inability or failure of the First Respondent or the Director General to act expeditiously should result in the Second Respondent being denied his right to have his representations heard before the Industrial Court, particularly where it concerns his right to earn a livelihood which is a fundamental right guaranteed by the Federal Constitution."

[12] See *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771.

The Law On Delay As A Vitiating Factor

[13] A convenient starting point is the case of *Minister of Labour v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195, where the Hashim Yeop Sani test is laid down:

> The Minister's discretion under Section 20(3) is wide but not unlimited ... so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. (at page 12 of the report)

[14] In *Chang Meng Yuen*, on the other hand, a subsidiary proposition counselled the courts against considering matters beyond materials presented before the Minister, namely materials disclosed during the conciliation proceedings:

> On what facts and circumstances should a judicial review Court rely when deciding whether the Minister has exercised his discretion according to law? In like cases as the present, the real contesting parties are the employer and the workman. Both sides have presented their version of the case to the Court which cannot be different from that laid before the Director General of Industrial Relations and the Minister. That is the only material which the Court has to consider. In the present case, there is only the bare allegation that the Minister has acted unreasonably because he has not given reasons for his decision. That is not enough.
>
> (at page 341-342 of the report)

[15] On the issue of delay, a view can be taken that delay alone would not be a sufficient ground to vitiate a decision, and for delay to operate, it should prejudice the applicant. Nevertheless, "delay" as a ground to quash an administrative decision or action has been recognised by the Malaysian Courts as well as Courts in the Commonwealth. This ground of correction has at times been subsumed under the general heading of unreasonable exercise, or technical abuse, of power. In the Malaysian Courts, delay as a ground has notably been a determining factor in land acquisition cases, one of which is *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* [1983] 1 LNS 14, which was quoted before this court in submission. Tun Salleh Abas CJ (Malaya) (as he then was), delivering the judgment of the Federal Court, said in that case:

> Every exercise of statutory power must not only be in conformity with the express words of the Statute but above all must also comply with certain implied requirements. The Court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness...
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> ...
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> The Collector may have plenty of work and other duties to perform within the available time at his disposal, but he must consider not only the interests of the State of which he is an official, but also that of the landowners, whose land he is acquiring. He must therefore arrange his duties in such a way as not to neglect their interests altogether. Failure to do so, resulting in the diminution of their interests, in our view, amounts to an abuse of power, which entitles the land owners concerned to an order of *certiorari*. (at pages 37-38)

[16] The Federal Court's views on delay as a factor which can vitiate a decision was subsequently indorsed by the Privy Council in *Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Kam Gin Paik & Ors* [1986] 1 CLJ 283; [1986] CLJ (Rep) 33 PC, where Lord Keith of Kinkel said:

> Delay contrary to the express or implied statutory requirements is in itself a ground invalidating proceedings which follow such delay, without the necessity of any inference that the acquisition has been abandoned. (at p. 38)

[17] Other cases which have discussed delay, in the context of land acquisition disputes, include *Pow Hing & Anor v. Registrar of Titles, Malacca* [1980] 1 LNS 120, *Pemungut Hasil Tanah, Kuantan v. Oriental Rubber & Palm Oil Sdn Bhd* [1985] 1 LNS 127, and *Tan Boon Bak & Sons Ltd v. Government Of The State Of Perak & Anor* [1982] CLJ 499; [1982] CLJ (Rep) 788. See M.P. Jain, *Administrative Law of Singapore and Singapore* (1997), for a comprehensive analysis of "administrative delay" in the context of discretionary power, at pp. 501-508. This learned commentator of Malaysian Administrative Law introduced this area of the law by stating aptly:

> Bureaucratic inertia is proverbial. An important question therefore arises: What is the effect of delay on the exercise of discretionary powers? To hold that inordinate delay will invalidate an administrative action is one way to promote administrative efficiency which will be for the public good. To some extent, the Courts in Malaysia seek to promote this principle. (at p. 501)

[18] The present case, being one of industrial law, presents a different scenario no doubt. Under a s. 20(3) Industrial Relations Act scenario, there are three main parties involved, unlike a land acquisition dispute. On the one hand, there is the claimant dismissed employee who is claiming for unlawful dismissal. Against this, there is the employer who invariably maintains a contrary position: that the dismissal is lawful and with just cause and excuse. The Minister and the Industrial Relations Department occupy the third position. If the Minister's decision to refer a dismissed employee's representation to the Industrial Court is quashed by reason of delay, the dismissed employee's interest will be directly affected. Further, the right to employment (the right to livelihood) has been recognised by Malaysian courts as a fundamental right

under the Federal Constitution: "And, 'life' in art. 5 of the Constitution, as Gopal Sri Ram JCA has said in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* ... is wide enough to encompass the right to be engaged in lawful and gainful employment", per Edgar Joseph Jr FCJ *R Rama Chandran v. Industrial Court of Malaysia* [1997] 1 CLJ 147.

[19] That this ground applies generally in industrial law has been recognised in *Kumpulan Guthrie Sdn Bhd v. The Minister of Labour and Manpower & Ors* [1986] 1 CLJ 566; [1986] CLJ (Rep) 426, where Eusoff Chin J (as he then was), in referring to the 28 months delay in the referral under s. 20(3), said:

> Applicant's counsel submitted that the Minister had taken 28 months to refer the dispute over the 3rd Respondent's dismissal and in so doing he had acted in excess of the powers vested in him under the Industrial Relations Act. I agree that on the face of it there had been a long delay especially between the first conciliation meeting and the second conciliation meeting. But this delay was not caused by the Director of Industrial Relations since the parties had agreed to await the result of the criminal case against the 3rd Respondent before proceeding further with the negotiation. (at p. 570 of the report)

[20] This decision of the High Court is therefore authority for the applicability of delay as a ground, but on the facts the Minister's decision was not quashed because the delay was not caused by the Director of Industrial Relations, but stemmed from the conduct of the parties themselves. In short, the Director General had acted reasonably on the facts.

[21] *Kumpulan Guthrie* also approached the issue of delay in a flexible manner. No reliance was placed on the provisions in the Interpretation Acts, but more on the wording of s. 20 itself, and in particular s. 20(2) with its reference to "expeditious settlement thereof" ... Eusoff Chin J (as he then was) said:

> Section 20(2) of the Act was amended by Act A484/80, and came into force on 30.5.80. The effect of the amendment was the removal form that section the period of thirty days from the date of representation made under section 20(1) of the Act within which the representation should be settled. If the Director General was satisfied that the representation was unlikely to be settled within the period of 30 days, or if the representation remained unsettled at the end of the period of thirty days, the Director General should notify

A the Minister accordingly. My view is that the removal of this period of thirty days is to give the parties more time to negotiate with each other, and the Director General is not bound by any period of time for the purpose of notifying the Minister. I am further of the view that notwithstanding the words "expeditious settlement thereof" appearing in Section 20(2) of the Act, the Director General should give to the parties as much time as is reasonable so long as the Director General is satisfied that there exists a likelihood of an amicable settlement being reached between the parties. The period of negotiation between the parties, therefore, is not dictated by the Director General, but by the parties themselves. Where the parties require more time to negotiate, or where, as in the instant case, the parties had agreed to await the result of the 3rd respondent's criminal case before resuming the negotiations, my view is that the Director General acted reasonably in granting the time requested for by the parties as long as he is satisfied that there was likelihood that the parties would reach a settlement on the dispute. (at p. 571 of the report)

[22] I had expressed the same views in another application (*Sime Darby Berhad v. 1. Menteri Sumber Manusia. 2. Quah Swee Khoon. 3. Mahkamah Perusahaan* (R3(2)-25-28-2004)), but in that case I had allowed the application for judicial review since I was satisfied the element of prejudice to the applicant was substantiated when placed against the reason for the inordinate delay given by the Minister. It will not be correct to adopt a rigid approach to the factor of delay. Much will depend on the precise circumstances, and the relative positions of the parties.

Application Of The Law To The Facts

[23] On the facts of this present application, the applicant was concerned it could not procure the necessary witnesses, given the passage of time. No other reason was proffered. I bore in mind the character of the applicant as a company whose activity was the management of hotels, and *per se* it would be a properly organised entity with proper documentary records. Even assuming the witnesses might not be successfully found and called to testify (a proposition still to be tested), the documentary record should still be available, despite the delay.

Conclusion

[24] After considering the totality of the facts and the law in relation to delay, I dismissed the applicant's application for judicial review for the orders of certiorari and prohibition as prayed for as substantive relief under paras. (a) and (b) of encl. 1 with no order

as to costs. I was not persuaded, given the circumstances and the reasons given by the applicant for the alleged prejudice which would be caused if the Industrial Court were to be allowed to proceed to hear the referral, that the Minister's decision should be quashed. I had balanced the alleged prejudice to the applicant against the prejudice that would have been caused to the second respondent, were this court to allow this application, and decided in favour of dismissing the application.

[25] I made no order on costs, since the applicant cannot be faulted for the delay. It was apparent there was inordinate delay. The issue to be resolved was whether there was sufficient and acceptable prejudice caused to the applicant.

[26] Application for judicial review dismissed with no order as to costs.